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IN THE

Supreme Court of the United States

October Term, 1962.

No. 400

LAWRENCE W. GOLDBERG,
Petitioner,

v.

UNITED STATES OF AMERICA,
ATOMIC ENERGY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Administrative Law Treatise, Davis, Vol. 3, Section 22.18, p. 92 (1958) 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, LAWRENCE W. GOLDBERG, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 5, 1962.

CITATIONS TO OPINIONS BELOW.

The Memorandum Order of the late Circuit Judge Herbert J. Goodrich is unreported and is printed in appendix B hereto, *infra* p. 12.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 5, 1962; p. 12, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED.

Whether the Court has jurisdiction over a Petition to Review an Order of the Atomic Energy Commission granting a construction permit for a nuclear power reactor to a private utility company in combination with a group of private utility companies brought by an individual citizen and taxpayer who alleges he is a person aggrieved by such grant on grounds:

1. Danger to his life and health and other members of the public resident within seventy miles of the construction site;

2. Violation of the Antitrust laws of the United States.

STATUTES INVOLVED.

The statutory provisions involved are Section 7 of the Atomic Energy Act of 1954, 71 Stat. 579; 42 U. S. C. § 2239; Section 4 of the Judicial Review Act, 64 Stat. 1130; 5 U. S. C. 1034 and Section 10(a) of the Administrative Procedure Act; 60 Stat. 243, 5 U. S. C. 1009(a). They are printed in appendix A, *infra* pp. 9 and 10.

STATEMENT.

The Application of the Philadelphia Electric Company for the grant of a construction permit for a nuclear power reactor in combination with fifty-two other private utility companies was filed with the Commission on July 25, 1960. In August 1961, Philadelphia Electric Company submitted a revised report at the request of the Commission whereupon the Commission issued a notice of hearing on November 8, 1961, published in the Federal Register on November 16, 1961 (26 F. R. 10736). One of the issues to be considered in that hearing was whether the construction of the type proposed at the proposed location could be operated and constructed without undue risk to the health and safety of the public, and whether the construction of the reactor would be inimical to the common defense and security or the health and safety of the public. Petitioner, a taxpayer and member of the public resident within seventy miles of the proposed construction site was sent a copy of the notice of hearing on November 28, 1961 in response to his previous request. Petitioner wrote the Commission to ask how he might intervene in the said hearing. On December 5, 1961 in a letter from an attorney for the Atomic Energy Commission Regulatory Staff, Petitioner was informed that he might file a Petition to Intervene in the proceedings pursuant to Section 2.705 of the Commission's Rules of Practice (10 C. F. R. part 2) or, in the alternative, enter a limited appearance pursuant to Section 2.731. Petitioner received a copy of the Commission's Rules of Practice with this letter.

Unrepresented by legal counsel, Petitioner appeared at the public hearing on December 18, 1961. At his request he was granted permission to make a limited appearance for the sole purpose of making an oral statement pursuant to Section 2.731 of the Commission's Rules of Practice. The Hearing Examiner who presided informed Petitioner

he might petition for leave to intervene as a party but did not explain the legal consequences of the choice involved. Petitioner's statement declared that the Atomic Energy Act of 1954 was unconstitutional as administered by the Commission in that it involved subsidization of one sector of the economy at the expense of others. It declared that it was the intent of Congress to establish a nuclear energy program under direction of the Federal Government involving broad participation and a wide dissemination of the knowledge derived from such a program, rather than merely providing federal funds for the development of Atomic Energy by private interests.

On February 2, 1962, the Hearing Examiner, as presiding officer issued an initial decision directing the issuance of the construction permit for the construction of the reactor, providing that in accordance with Sections 2.751 and 2.752 of the Commission's Rules of Practice a Petition to Review the decision could be filed within twenty days after the date of the initial decision, or on or before February 23, 1962; that if no such Petition were granted by the Commission, the decision would become final on March 5, 1962.

Under Sections 2.700 and 2.703 of the Commission's Rules of Practice, on February 23, 1962, Petitioner through an attorney retained on that date, sent a telegram to the Commission requesting a review of the initial decision by the Commission so that Petitioner might present testimony on the issue of whether the reactor would be inimical to the common defense and security or to the health and safety of the public, as well as raising constitutional and legal questions in connection with the issuance of the construction permit, and asking leave for Petitioner to intervene in the proceedings as a member of the public affected by the issuance of the construction permit. This Petition was denied in a Memorandum and Order by the Commission dated March 1, 1962 on the ground that his motion was not timely and that he did not explain his delay in moving

for leave to intervene in the proceedings for the purpose of presenting testimony.

On April 27, 1962, Petitioner filed with the Court of Appeals for the Third Circuit a Petition to Review and Set Aside the Order of the Commission, and a Motion for Stay pending determination of the Petition for Review.

After submission of Briefs on behalf of Petitioner and the Atomic Energy Commission, on May 7, 1962 the Motion of Philadelphia Electric Company to appear as a party was granted by the Court and Briefs were submitted by the Company. Argument on the Briefs took place on May 7, 1962 and on May 8, 1962, Petitioner's Motion for Stay was denied. Thereupon, the Atomic Energy Commission filed a Motion to Dismiss the Petition for Review on the ground that Petitioner was not a party aggrieved by the Order granting a construction permit and that he had suffered no legal wrong by that Order and had no standing to maintain the Petition to Review. The Philadelphia Electric Company also filed a Motion to Dismiss the Petition for Review on May 25, 1962. Memorandums were filed on behalf of the Atomic Energy Commission, Philadelphia Electric Company in favor of the Motion to Dismiss and by Petitioner against the Respondent's Motion to Dismiss. Argument on the Motion to Dismiss was taken by the Court on June 4, 1962 and an Order was made on June 5, 1962 that the Petition for Review be dismissed for lack of jurisdiction.

On July 16, 1962, Petitioner sent to the Court of Appeals and to all the parties concerned and their counsel a notification of intention to file the instant Petition for Certiorari.

REASONS FOR GRANTING THE WRIT.

1. The standing of a member of the public to obtain judicial review of the grant of a construction permit for a nuclear power reactor is an important and novel question of jurisdiction involving the Atomic Energy Act of 1954, the Judicial Review Act and the Administrative Procedure Act. It has not been decided in this Court. The issue was met as to national and international labor unions, some of their members and families, who were held to be parties aggrieved by issuance of a construction permit with standing to seek review of the order where they claimed the permit would result in construction of a reactor inherently unsafe under present technological conditions and thereby a physical danger to the unions involved, some of their members and families. *International Union of Electrical Radio and Machine Workers, AFL-CIO v. U. S.*, 280 F. 2d 645 (1960), 108 U. S. App. D. C. 97; cert. den., 81 S. Ct. 221, 364 U. S. 889, 5 L. Ed. 186, reversed on other grounds, 81 S. Ct. 1529, 367 U. S. 396, 6 L. Ed. 2d 924. Petitioner here similarly bases his claim of jurisdiction on the threatened danger to him as a member of the public living within the area affected as to health and safety by the grant of the permit. He also claims grievance by virtue of the alleged violation of the antitrust laws.

If the public interest is involved in threatened physical injury so as to confer standing for review on labor unions and their members acting as petitioners, as in the *International Union of Electrical Radio and Machine Workers* case, *supra*, then jurisdiction would seem to be present when an individual member of the public asserts the same injury as the ground of his grievance. Clearly, a resolution of this conflict in decisions by this Court would be in the public interest.

2. The decision of the Court below is in conflict with the decisions in this Court and in the Second Circuit wherein

one adversely affected in fact by an agency decision is allowed to challenge governmental action even though the rights asserted are not limited to the individual petitioner. See *F. C. C. v. Sanders Bros. Radio Station*, 309 U. S. 470, 60 S. Ct. 693, 84 L. Ed. 869 (1940). Also, *Associated Industries v. Ickes*, 134 F. 2d 694 (2d Cir.), dismissed as moot 320 U. S. 707, 64 S. Ct. 74, 88 L. Ed. 414 (1943); *Reade v. Ewing*, 205 F. 2d 630 (2d Cir. 1953).[1]

Clarification of the conflict in cases involving the law of "standing" or jurisdiction to seek judicial review is of great importance to the public. Clearly, Congress in the Atomic Energy Act of 1954, the Judicial Review Act of 1950 and the Administrative Procedure Act intended to permit someone who had a direct injury threatened by administrative action to have standing to intervene in the action and to have jurisdiction to seek review of the action of the Commission involved.

3. The decision of the court below is believed to be erroneous and the conflicting decision of the Court of Appeals

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1. Administrative Law Treatise, Davis, Vol. 3, Section 22.18, p. 92 (1958):

> "The federal courts cannot justify their law of standing by saying that the 'case' or 'controversy' requirement of Article III of the Constitution requires the artificiality and the complexity. Nothing in the Constitution—except what the Supreme Court has put there—requires a departure from the simple and natural proposition that one who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable. Whenever a private party is in fact adversely affected, asserts that administrative action is illegal, and whenever the defendant in the proceeding asserts that the action is legal, the technical requirement of a 'controversy' is met. This is what the Supreme Court itself has held in the *Sanders* case. What is needed is a consistent application of the *Sanders* doctrine.
>
> "The doctrine of 'private attorney generals', as developed in the Second Circuit (*Associated Industries v. Ickes*, supra), permits an adversely affected party to assert the public interest in challenging administrative action, whenever a statute provides for challenge by one who is 'aggrieved', or 'adversely affected'."

for the District of Columbia in *International Union of Electrical, Radio and Machine Workers, supra*, correct. Also the cited decisions in the Second Circuit in *Associated Industries v. Ickes, supra*, and *Reade v. Ewing, supra*. The decision of the court below is also in conflict with the rationale of the decision of this Court in *F. C. C. v. Sanders Bros. Radio Station, supra*.

The theory of these conflicting decisions would support Petitioner's right to intervene as a party in the hearing before the Commission as a person whose interest might be affected by the proceedings under the Atomic Energy Act of 1954, Section 7, *supra;* his jurisdiction to seek review as a party aggrieved by the final order under the Judicial Review Act of 1950; and as a person suffering legal wrong because of the agency action and/or as one adversely affected or aggrieved by such action under Section 10(a) of the Administrative Procedure Act, *supra*.

It is a matter of great public interest to determine whether a member of the public residing within seventy miles of the construction site of a nuclear reactor who alleges the threat of direct physical injury in the event of any unforeseen development has standing to seek judicial review of the grant of such a construction permit. This question has not been decided by this Court, and we submit has been erroneously decided by the court below.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VICTOR HUGO WRIGHT,
MALCOLM W. BERKOWITZ,
Counsel for Petitioner.

August 29, 1962.

APPENDIX A.

Section 7, Atomic Energy Act of 1954, 71 Stat. 579; 42 U. S. C. § 2239:

"(a) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application under section 2133 or 2134(b) of this title for a license for a testing facility. As amended Sept. 2, 1957, Publ. L. 85-256, § 7, 71 Stat. 579."

Section 4, Judicial Review Act of 1950, 64 Stat. 1130; 5 U.S. C. 1034:

"Any party aggrieved by a final order reviewable under this Act [§ 1031 et seq. of this title] may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof [§ 1033 of this title] lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of the agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is

sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General (Dec. 29, 1950, c. 1189, § 4, 64 Stat. 1130)."

Section 10(a), Administrative Procedure Act, 60 Stat. 243; 5 U. S. C. 1009(a):

"(a) Right of review—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,018.

LAWRENCE W. GOLDBERG

v.

UNITED STATES OF AMERICA,

ATOMIC ENERGY COMMISSION.

Present: McLAUGHLIN, STALEY and GANEY, *Circuit Judges.*

ORDER.

Petitioner's motion for a stay in this case is denied.

By THE COURT,

McLAUGHLIN,

Circuit Judge.

Dated: May 8, 1962.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,018.

LAWRENCE W. GOLDBERG,
Petitioner,

v.

UNITED STATES OF AMERICA,
ATOMIC ENERGY COMMISSION,
Respondents.

PHILADELPHIA ELECTRIC COMPANY,
(PARTY IN INTEREST).

Present: GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges.*

Upon consideration of the motions by respondents and by Philadelphia Electric Company to dismiss the petition for review in the above case, and of the briefs in support of the motions, and the brief of petitioner in opposition, and after hearing;

It is ORDERED that the petition for review be, and it is hereby dismissed for lack of jurisdiction.

By THE COURT,
GOODRICH,
Circuit Judge.

June 5, 1962.